CONCEPTIONS OF LAW: ISLAMIC AND WESTERN

I should like to begin by saying what a pleasure it is. and what an honor I consider it to be, to be asked to give this series of lectures under the auspices of New Y ork University School of Law. It was only some eighteen months ago that I paid my first visit to this country , having previously always traveled East rather than West: but I enjoyed this experience so much that when an invitation came to spend some three months as visiting professor , dividing time between the Department of Oriental Studies .. Princeton University and this law school, I was eager to accept.

You will understand, however , that I approach this series of lectures with some difference, for it is inevitable that my audience, distinguished though it obviously is, should come from extremely varied backgrounds. Some are experts in English law or jurisprudence, but with little or no knowledge of the law of Islam, while others are experts in the Middle East or some other plan of the Muslim world, but not lawyers. So I trust that all will pardon me if part of what I say to you may appear somewhat obvious and commonplace.

Now in any consideration of Islamic law , even for th most practical of purposes —and, not least, in any consideration of the place it holds in the modern world —it is essential initially to understand the nature and ethos of that law, radically different as they are from W estern concepts. That is why for my first lecture I have chosen the subject "Conceptions of Law—Islamic and Western."" There can be no doubt that the- first, and basic, and most obvious distinction of all between the two systems —it distinction that obtrudes itself on the most superficial approach to the subject —is that Western law, as we know ii is essentially secular, whereas Islamic law is essentially religious. But merely to say this is to express the fundamental difference in a wholly inadequate way.

As you will all know, the law of continental Europe looks back, generally speaking, to Roman law . And Roman law, of course, received its most authoritative articulation under Justinian, when the empire was already officially Christian. But th e Justinian legislation itself looked bad to the great jurists of the Antonine era, who wrote at time when the old paganism had already lost its hold over educated men, yet before the influence of Christianity has taken its place. Essentially , then, Roman law represents. Law devised by men for men, a masterpiece of mature legal deliberation. It was 'therefore a law that could be changed if circumstances so required, in much ' the same way in wh ich it had been formulated.This is the 'heritage of the civil law countries today . In these countries we find a legal system based on codes derived in large part from Roman law, as enacted by emperor or legislature, although interpreted and applied, of course, by the courts. It is a human, secular law that can easily be changed by the same authority that enacted it. And much the same applies fundamentally to the law of Britain and America. Here the common law is in the ascendant, and the case law of the courts assumes a dominant position, although legislation is today assuming an ever -greater importance. H owever this may be, it is a secular , human law that can easily be changed by the legislature, with the proviso, of course, that in this country the Supreme Court may always strike down any ordinary legislation as contrary to the Constitution.

But Islamic law (and to a lesser extent many other legal systems of the Orient) is essentially dif ferent, for it is regarded fundamentally as divine law-and, as such, as basically immutable.

To the Muslim there is indeed an ethical quality in every lunian action, characterized by qubh (ugliness, un-suitability) on the one hand or husn (beauty , suitability) on the other. But this ethical quality is not

such as can be perceived by human reason; instead, man is completely dependent in this matter on divine revelation. Thus all human actions are subsumed, according to a widely accepted classification, under five categories: as commanded, recommended, 1 left legally indif ferent, reprehended, or else prohibited by Almighty God. And it is only in regard to the middle category (i.e., those things which are left

1.i.e., one who acts accordingly may expect to be rewarded, but one who does not will not be punished, in the next world. The same principle applies, mutatis mutandis, in regard to what is reprehended.

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legally indifferent) that there is in theory any scope for human legislation.

But this fact leads directly to the second basic dif ference between these two systems; of law , namely, that Islamic law is enormously wider in its scope than W estern law. To the Western mind, law-in the lawyer's sense-may be defined for our immediate purpose as what i s, or at least might be, enforced by the courts. Islamic law , on the con trary, takes the whole of human conduct for its field. If you consult any of .the classical compendiums of law , you will find that they deal first-in the vast majority of cases-with such questions as ritual purity , prayer, fasting, almsgiving, and pilgrimage; next, it may be, with family law (i.e., marriage, divorce, paternity , guardianship, and succession); then, perhaps, with the law of contract, of civil wrongs, and of what we should call crimes;

while they also deal with such questions as the law of peace and war , the law of evidence and procedure, and with a multitude of other subjects such as the circumstances in which an invitation to a wedding may properly be refused. It thus covers every field of law-public and private, national and international-together with an enormous amount of material that; we in the W est would not regard as law at all.

A Muslim may indeed consult his lawyer, just as a Westerner might, as to how he can avoid trouble with the courts or safeguard his financial interests; but he may also look to him for religious and ethical advice, and for guidance as to what actions will, and what will not, please his Maker .[1]'

But. it is obvious, of course, that much of this law could

never in the very nature of things be enforced by human courts. It is only , for example, those actions which are specifically commanded or forbidden —not the intermedi ate categories of what is recommended, left legally indif ferent, or reprehended—which could be so enforced; and we find a great deal, even within these two decisive cate gories, which is left, in so far as any sanction is concerned, to the bar of Eternity. It is readily un derstandable, then, to find that Islamic law has been aptly described **as a** "Doctrine of Duties."[2][3]

It may be helpful and suggestive if we next look at this law with the eye of a student of W estern theories of jurisprudence, although I myself cannot claim to be any expert in this field.

Let us take, in the first place, the Austinian theory . "The matter of J urisprudence," Austin tells us, "is positive law: law, simply and stric tly so called: or law set by political superiors to political inferiors. "[3]* But can this theory possibly be applied to Islamic law? The answer seems clear that it can be so applied only if the "political superior" of the definition is conceived in terms of Al mighty God, who will enforce this law in such manner as He sees fit.

Or take, in the second place, Hans Kelson's "Pure Theory of Law" as another example of what may be termed the Imperative school. Jurisprudence, he assures us, ^s concerned with "law as it is, not as it should be.

But in the Islamic theory (although not, of course, alto gether in practice) precisely the contrary is true. Again, Kelsen defines law as a "system or hierarchy of norms whic h prescribe what always ought to happen in given circumstances "—all resting in the final analysis on the "basic norm" of the "first constitution" of the state con cerned.' But this definition, equally obviously , can only be applied to Islamic law—in its jurisprudential theory — if we conceive this basic norm or first constitution in terms of the sovereignty of God and the authority of His revelation (as the Muslim regards it).

Let us turn, in the third place, to the Historical school of jurisprudence, if I may so term it. T o the historical jurists law, like language, manners, and constitution, has no separate existence but is a simple function or facet of the whole life of a nation. In early times, we are told, the common conviction of the people is the origin of law; but, with the development of civilization, the making of law , like every other activity, becomes a distinct functio n, and is now exercised by the legal profession. So law "arises from silent, anonymous forces, which are not directed by arbitrary or conscious intention, but operate in the way of customary law. [4]* But this theory, however true it m ay be of the way in which much of Islamic law did in fact evolve, is fundamentally incompatible with its basic concept and. theory . It is, however, noteworthy in passing that the emphasis put by this* school on the art by the legal profession in the making of the law is particularly relevant to the way in which Islamic law was developed; for this law has always been a "lawyers' law"

• (based indeed not so much on the law of the courts as on the law o f the textbooks, not so much on the decisions of judges as on the opinions of jurists); but a law which those lawyers always profess to have derived not from "silent, anonymous forces " or from the operations of cus tomary law, but from the only reliable criterion of divine revelation.

Or take, in *the* fourth place, the Sociological school of jurisprudence. T o the sociological jurists the paramount consideration is not so much the history of the law as the mutual influence of law and society . Now this again may represent an admirable picture of how Islamic law did in

• part develops in the pages of history; but it is radically incompatible with its juristic theory. For by that theory, it is clear, it is not society that influences law, but the law that provides a divinely revealed norm and standard to which Muslim society is under a perpetual duty to conform.

Or consider, in the fifth place, what we may term the American Realists, as exemplified in the famous words of Justice Holmes: [5]"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."' Now this, no doubt, may be an apt definition of Islamic law as actually administered in this country or that; but it represents a definition which no Islamic jurist would tolerate for a moment as a description of the Shari'a—or Islamic law—as such. On the contrary, however far the courts may stray in practice from the right path to the Muslim the Shari'a remains the Shari'a which the courts or to apply to and which every individual is bound to obey .

Again, let us turn, in the sixth place, to the Swedish Realist. "The 'binding force' of law," Olivecrona assures us "is a reality merely as an idea in human minds. " This idea indeed may be said even to fulfill a "dangerous, re actionary and obscurantist function. It suggests to the human mind that law is something standing outside and above the facts of social life, that law has an independent validity of its own which is not man-made." The reality, he tells us, is that "law is made by m en, that it exerts pres sure on men, on the public and on policemen, and on judges. "[6]* But this attitude contrasts with the Islamic con ception of the Shari'a most clearly and decisively of all. For to the Muslim t he Shari'.-i does most certainly stand

outside and above the facts of social life; it unquestionably has an independent validity of its own which is not man-made. Even if, moreover , it exerted pressure on no one at all, it would still remain the law , which is divinely incumbent on all believers.

It is then we turn finally to the exponents of natural law that we find a far more congruous comparison. For the natural lawyers, like the Muslim jurists, conceive of law in terms of an eternal, transcendental to which mankind is of necessity required always attempting to approximate. Y et even here there are certain fundamental dif ferences be tween the two concepts, which are, I think, deeply significant. I must confine myself in this context to two: first that the natural lawyers conceive of that law as being inherent in the very nature of things, in the universe, in the nature of rational creatures, and in the fundamental rights of man; and, second, that they also conceive of that law as being discernible —in large part— by human reason, which is competent to determine the general outline, at least, of natural justice. But when we turn to what I may term the dominant or central doctrine of Muslim orthodoxy , we find that neither of these proportions is in fact accepted; for the Ash 'aris'' deny not only mat the human mind, apart from divine revelation, is capable of discerning the ethical quality in human actions, but even that such an ethical quality exists at all, apart from the divine command or prohibition. T o them God docs not command certain actions because they are in trinsically good, nor forbid certain behavior because it is inherently evil; instead, actions are good or bad ex clusively because God commands or forbids them.

Yet this view, though dominant, was b y no means un disputed in Islam. The Mu 'tazalis[7], for instance, took a very dif ferent position. To them all human behavior **was** intrinsically good or evil, and God commanded the good **because it was** good and forbade the evil because it was evil. Further , they **held that in** some cases human reason could indeed perceive —quite independently **of any dir ect** revelation—that an act was good or bad in itself; and in such cases revelation did no more than confirm this judgment **of** the **human mind. In other cases,** however, man could not of himself perceive the inherent ethical quality in a certain course of conduct, and in such circumstance he was, of course, dependent on divine revelation to guidance. And although the Mu 'tazili's *were* largely discredited by the passage of the years, others-such as the Maturidis [8] and many Hanafi jurists —shared their view in regard to these two propositions.

To review the position, then, it seems clear that the views of the Imperative school of jurisprudence can be applied to the Islamic conception only if Austin 's "political superior" and Kelson's "basic norm" and "first con stitution" are interpreted in a theological sense; that the views of the Historical and Sociological schools, however much they may explain in part how Islamic law developed in history , are fundamentally incompatible with its jurist-prudential theory; and that the assertions of the Realists-in their American and, still more, their Swedish varieties-are even more diametrically incompatible with the Islamic concept. The views of the Natural Law school, on the other hand, are much closer to the Islamic doctrine, but with certain significant dif ferences. As for the place of human reason, the Muslim jurists accord this a vital role, **as** we will see, in the deduction of substantive legal rules from the revealed sources, hue virtually no place as a source from which the substantive law may itself be de - rived.

But enough, I think, of this jurisprudential comparison. It is time to look more closely at Islamic law itself and the sources from which it was in fact derived.

The first **source** of this law, as all Muslims **would affirm,** *Conceptions of Law: Islamic and W estern* **11**

is -the Koran, which is regarded by the orthodox as the *ipsissima verba* of God, written from eternity in Arabic in heaven, and vouchsafed to the Prophet, as the need arose, through the agency of the Angel Gabriel. We even find Islamic law described at times —but always, I think, by non-Muslims —as the "law of the Koran." In point of fact, however , there are comparatively few verses in the Koran that arc of any strictly legal significance. T o describe the Shari 'a as the "law of the Koran," therefore, is

somewhat analogous to describing Roman law as the law of the T welve Tables," except that it is certainly true that some of the rules of Islamic law can be traced straight back to this fundamental source. All the same, Joseph Scratch has shown that the derivation of legal rules from the Koran was not so much primary (as the traditional theory , of course, asserts) as secondary; for these rules were not so much taken directly from the Koran *in abstracts* as from customary law and administrative prac tice, as these were confirmed, rejected, or amended by the jurists- in the light of Koranic —or, indeed, general Islamic—teaching.[9]

In case, the Koran alone *could* never have provided an adequate source for any legal system.ic 'ec-:.2te source for any legal s)5tem. So in the tradi tional \view it was augmented from the very first by the Sunna or custom of the Prophet; for Sunni jurists main tain the,; when .Mohammed died, the fount of divine revelation ceased to flow, and his community was left with the divine Book (which was soon compiled) and with the memory of how the Prophet had himself acted; and that they used the latter to fill out the former. Again, however, Schacht and others have 'shown that this is more an idealized than a historical account of how Islamic law was developed at the beginning of the Muslim era, for in early years the science of traditions as to what the Prophet had said, done, or allowed —which were later held to authenticate his Sunna—was completely undeveloped. On the contrary , the term Sunna in its earliest connotations meant first the ancient customs of the Arabs and then the "living tradition" of the ancient schools of law.[10] But the situation underwent a radical change from around the end of the second century of the Muslim era, and specific traditions as to what Mohammed had said, had done, or had allowed to be done in hi presence —most of them, beyond question, fabricated —came to be acknowledged as the second source of the Shari 'a.

Yet even these traditions, more and more numerous though they cam e to be—for the demand stimulated the supply—could never in the very nature of things meet all the varied requirements of daily life. Further rules of law therefore had to be devised in some way by the jurists. At first they did this on die general basis of what they thought was right and proper , as is well illustrated by the certainly apocryphal story of the conversation between Mohammed and one (Mu 'adh) whom he was sending as a judge to the Yemen. "On what," Mohammed is said to have asked, "will you base your judgments? " "On the Book of God," Mu'adh replied. "But supposing there is nothing therein to help you?" "Then," said Mu'adh, "I will-judge by the Sunna of the Prophet. " "But supposing there is nothing there, either , to help you?" "Then I ● will follow my own opinion, " Mu'adh is supposed to have replied; and Mohammed is said to have thanked the Almighty that H e had vouchsafed him such a worthy emissary .

It was not very long, however , before the view came to prevail that this juristic opinion *{ra 'y)* was at once too subjective and too fallible a basis on which to found a law which was divinely authoritative. It was too subjective;

and so .the jurist 's general sense of what was the right rule came co be largely confined to an application of strict rules of analogy *{(Qiyas),* by which a rule contained in the Koran or Sunna could be extended to some similar, but not identical, situation. But it was also too fallible, for it was recognized that even in the application of rules of analogy an individual jurist might err . So the opinion gained ground among the Sunnis— partly, it seems, by w ay of reaction to the infallible Imam, or leader , whom ;he "heterodox" Shi'is claimed—that although individuals might err , the great jurists , collectively, could not; so the consensus of the jurists (or , as it is sometimes put, of the Muslim community) came to be regarded as yet another manifestation of the divine voice.

It was thus that in the classical view of Islamic juris prudence the Shari 'a was held to be based on the Koran, the Sunna, and the consensus, together with analogical deductions from these. Certain subsidiary sources are also commonly mentioned in this connection, but need not detain us now . It is, however, worthy of passing note that an enormous proportion of the law rests in fact on these last two sources

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There are three further points I want to emphasize First, that in the early days any adequately qualified jurist was regarded as having the faculty of *ijtihad,* that is, the right to go back to the original sources and interpret them for himself. But with the passage of-the years, the crystallization of the different schools of law and the progressive enunciation of the doctrine, this faculty was held to have fallen into abeyance; and, since about the end of the third century oŁ the Hijra, all jurists have been regarded *as* mere *muqallids,* that is; those whose duty it is to accept the opinions of their great predecessors without the exercise of private judgment. It **is** true that many authorities allow that even a *muqallid* may, in the exigencies of private life, pick and choose between the different opinions of his great predecessors; but it was generally asserted that the judge and the jurisconsult had no such liberty in their public capacity, but must follow the dominant opinion in their particular school in every detail. It was thus that until recently Sunni Islam had become largely moribund. The law was still the principal discipline for study; but this study showed itself in the production of commentaries, glosses, more commentaries and more glosses—most of them representing a substantial repetition of what had gone before. There was indeed a certain development. particularly in the books of *Fatawa* or legal decisions, but it was very slow; and it was the dominant opinion that **came to prevail in each of the schools, on this point** that, which constituted the authoritative criterion.

Second, what of these schools of law to which I have made a number of references? Suffice it to say that in early days the jurists tended to draw together on a region basis, as we find in Iraq, Medina, Syria, and elsewhere At a somewhat later date they came to group themselves around some dominant figure, such as Shafi'i; whereupon even the regional groupings began to call themselves by name of" one of their leading jurists. Eventually four schools not only established themselves but survived Sunni Islam (the Hanafis, Malikis, Shafi'is, and Hanbal:

and these, although they differ from each other on numerable points, mutually recognize each other's orthodoxy. In addition there are a number of "heterodox schools; there are records of schools that

once existed but have not survived; and there are a multitude of variant opinions either attributed to early jurists before t schools crystallized or championed by more independent thinkers throughout the long history of Islam.

Third, it is noteworthy that although in theory all parts of the divine law rest equally on revelation, in practice a certain distinction can in fact be made. It is the personal and family law that, together with rules of ritual and religious observance, has always been regarded as the very heart of the Shari'a. The public law, on the other hand altho ugh in theory equally based on divine authority , has been much less meticulously observed down the centuries. I shall return to this subject later on.

This, then, was the position up till about 1850. It against this essential background that we must view the recent reforms that will constitute the subject of the next lecture, when I shall trace the attempts *which* have been made during the last century or so to bring the law more into line with the facts of modern life, and when I shall consider the fascinating problem of how a theoretically immutable law can in fact be amended in practice.

THE END

[1] s Cf. D. B. Macdonald], Muslim Theology, .Jurisprudence and Constitutional Theory (New York, 1903), p. 73.

[2] *s Cf' Encyclopedia of 'Islam* II, 105 (I. Goldziher, quoting C. Snouck Hur gronje).

[3] <J. Austin, *The Province of Jurisprudence, D etermined* (Lon-d0". '954). P- 9-

H . Kelsert, *General Theory of Law and the State* (Cambridge, Mais., 10.•p), pp. 123 flf., 153.

*** H. •'** . ;orowicz, "Savigny and ihc Historical School of Law **in *Law*** *Quarterly Review,* 53 (1937). 332 ff.

[5] O.W.Holmes "The path of Law" (1897)

Harvard Law Review p.461

[6] K. Olivecrona, Law as fact (Copenhagen, 1939), p. 17; G..J.Hughes, Jurisprudence (London, 1955), p.162

[7] "The Mu'tazilites were a party of sincere Muslims **certain** rationalistic tendencies. They enjoyed a short period of ... dominance before **being** branded **as** heretical.

[8] " The Maturidis are a school of scholastic theology parallel to. but are popular than, the Ash'aris School.

[9] 1; Cf. J. Schacht, *Origins of Muhammad/in Jurisprudence* (Oxford, 1950. pp. pp190.; also in *Law in the Middle East* (Washington, 19553 pp. 39 ff,

[10] *"Cf.* Origins. *588.;* La:, the Middle East. p. 41